No. 89 -1625

In The
Supreme Court of the United States
October Term, 1989

CITY OF BURLINGTON, and ROBERT WHALEN
Operations Manager of Parks & Recreation Department,

Petitioners

v.

MARK A. KAPLAN, ESQ.
RABBI JAMES S. GLAZIER,
and REVEREND MR. ROBERT E. SENGHAS

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Brief of the Ottawa Jaycees and The National Legal Foundation Amici Curiae in Support of the Petition.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in requiring the city of Burlington to engage in content based censorship of free religious expression on public forum property by mandating that the City ban placement of a Menorah by a private group in City Hall Park.

2. Whether this Court should provide a clear standard regarding the private expression of religious speech on public forum property upon which citizens and municipalities can rely.

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Interest of Amici

1. The Ottawa Jaycees is a private, volunteer group affiliated with the National Jaycees organization. The objective of the Ottawa Jaycees is to promote individual development, community development and management skills. It achieves these objectives by

providing individual members the opportunity to participate in projects and programs that emphasize personal and community development.

During the Christmas holiday seasons from the end of 1980 to the present and 1957 to 1962, 1968, and 1969, the Ottawa Jaycees has erected, maintained and dismantled a set of sixteen paintings depicting scenes from the life of Jesus Christ. These paintings were erected in Washington Park, a public park located in and owned by the City of Ottawa, Illinois. Since 1988, Washington Park has also hosted the Festival of Lights during the Christmas holiday season. This festival includes lights, candles, bows, snowflakes, and a fifteen-foot snowman. The lights are placed in the tree branches and on various memorials in the park. The Salvation Army has also erected its own evergreen Christmas tree in the park.

The City's custom and practice with respect to the park was and is to allow free and equal access to Washington Park for all lawful purposes. Use of the park dates back to at least 1858, when Abraham Lincoln and Stephen Douglas selected Washington Park as the site for one of their senatorial debates. One hundred thirty years later, George Bush selected Washington Park as a forum for a speech and rally during his campaign for the presidency.

Washington Park has also been the site or one of the sites for numerous festivals, including the Friendship

Day Festival and the River Front Festival held annually since 1987. These festivals feature concerts and flea markets. Ottawa's Sesquicentennial Celebration in 1987 was also held in the park. That celebration included flea markets, barbecues, health fares, carnivals, book sales, games and ceremonies in the park. Washington Park has served as the location for public concerts by singers and musicians, including concerts for world peace in 1982 and 1984. In addition, there have been art shows, Vietnam Vets Recognition Ceremonies for POW/MIAs in 1986, 1987, and 1988, a United Way Lunch and a Camp Fire Girls Ceremony.

Washington Park has also served as the site for various religious services, including: an Open Air Meeting by the Congregation of the New Life Ministry, Inc., in 1983; a special church service and religious concert in 1984; the River Cluster United methodist Churches Worship Service and the Illinois Valley Citizens for Life Prayer Vigil in 1985; Pastor Reed Church Service in 1986; and the Amazing Grace Fellowship meeting and Concert, All Church Concert and Sesquicentennial Interfaith Church Service in 1987.

During the Christmas holiday season, a Santa Claus House has been displayed in Washington Park, every year during the 1960's and 1970's and more recently in alternating years. The lamp posts in the downtown area, including the lamp posts in and surrounding Washington Park, are decorated with holiday symbols.

On August 11, 1988, the original plaintiff, Richard J. Rohrer, filed a complaint against the City of Ottawa and its officials claiming that they violated the First and Fourteenth Amendments by not prohibiting the display. Mr. Rohrer sought an injunction permanently banning the display. The Ottawa Jaycees intervened as of right in the district court.

Rohrer amended his complaint on January 11, 1989. The amended complaint sought a permanent injunction prohibiting defendants from allowing the display without imposing limits on its frequency and duration as allegedly compelled by the Establishment Clause. The complaint was amended again on June 12, 1989, to substitute plaintiffs after Rohrer moved from the State of Illinois; Jane Doe, a resident of the City of Ottawa, became the new plaintiff.

After discovery, all parties filed cross-motions for summary judgment. On December 4, 1989, the district judge issued a Memorandum Opinion and Order, *Doe v. Small,* 726 F.Supp. 713 (N.D. Ill., 1989) granting plaintiff's motion for summary judgment and denying the separate motions of the City of Ottawa and its officials and of the Ottawa Jaycees. The district judge ordered that the City have the Paintings removed from Washington Park by December 8, 1989.[1] The Ottawa Jaycees removed the

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1. The plaintiff never requested a temporary injunction prohibiting the display during the pendency of the suit, and on

Paintings on December 8. On December 22, 1989, the Ottawa Jaycees filed its Notice of Appeal with the United States Circuit Court of Appeals for the Seventh Circuit. The City of Ottawa and its officials have not appealed from the judgment of the district court.

2. The National Legal Foundation is a non profit public interest law firm dedicated to the preservation and defense of religious liberty. The Foundation as co-counsel is providing legal representation for the Ottawa Jaycees in their battle against censorship of their religious speech in a public park.

The Foundation has litigated several cases in both federal and state courts to preserve the right of speakers with religious messages to use publicly owned property generally available for speech activities. One such case is *Board of Education of Westside Community Schools v. Mergens*, No. 88-1597, cert. granted 7/3/89, currently before this Court, which involves interpretation and implementation of the Equal Access Act of 1984 which prohibits discrimination against religious clubs on public high school campuses. Another such case is *Deeper Life Christian Fellowship v. Board of Education of the City of New York*, in which the Foundation is representing a Richmond Hill, New York, church that was denied the

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November 25, 1989, the Ottawa Jaycees erected the Paintings in Washington Park.

use of a school building generally available on a rental basis to other community groups in the city after school hours. See *Id.*, 852 F.2d. 676 (2d Cir. 1988).

The National Legal Foundation is gravely concerned that opinions such as that of the court below are relegating religious speech and practice to a second-rate status in the public square. The effect of the *Burlington* court's opinion is to make public parks "religious free" zones, contrary to the First Amendment.

3. The purpose of this brief is to draw the Court's attention to the prevalence of discrimination against religious speech and speakers in use of public forums. Your *amici* submit that exclusion of religious speech, speakers, and symbols from public forums, directly violates the free speech rights of religious speakers by excluding them from generally available forums.

Oral permission from the parties consenting to this filing has been obtained. Letters of confirmation will be submitted, upon receipt, to the Clerk pursuant to Rule 37.2.

STATEMENT OF THE CASE

The factual circumstances in the instant case closely resemble those in Ottawa, where *amici* are involved in litigation. Common and contrasting factual elements include the following:

1. Both parks contain unattended solitary monuments and symbols. While Burlington City Hall sits within the park involved in this case, no City of Ottawa buildings are located within Washington park or are visible from the park.

2. In both cases, private groups seek to use public forums for speech with religious content. The displays at issue are privately erected, maintained and removed. No government funds support the displays.

3. City Hall Park in Burlington is a traditional public forum as is Washington Park in Ottawa. Both parks are in prominent locations within their respective cities.

4. Both parks have been used time immemorial by the public for a wide variety

of social, artistic, ceremonial and political events. Each park has also been utilized for religious activities.

5. Both parks are operated on an equal access basis, the City of Burlington requiring a specific permit, and the City of Ottawa requiring no permit, but allowing free access on a first-come, first-served basis. No person has ever been denied permission to use either park.

6. Both displays were accompanied by disclaimer signs noting that the displays were sponsored by private groups.

REASONS FOR GRANTING THE WRIT

The petition raises important issues of first amendment law concerning freedom of speech and religion. At issue is whether the Establishment Clause requires municipal governments to censor religious speech on public forum property because of its religious content. The decision of the court below requires this result.

The majority opinion for the court below misapplied this Court's opinion in *County of Allegheny v. A.C.L.U.*, 106 L.Ed.2d 472 (1989), to exclude the display of the solitary menorah on public forum property. The

creche declared unconstitutional in *County of Allegheny* was not displayed on public forum property. Nevertheless, that decision specifically anticipated the question of religious displays on public forum property:

> The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.... In this respect, the creche here does not raise the kind of "public forum" issue, cf. *Widmar v. Vincent*, [citations omitted], presented by the creche in *McCreary v. Stone* 739 F.2d 716 (CA2 1984), aff'd by an equally divided Court, sub nom. *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83, 85 L.Ed.2d. 63, 105 S.Ct. 1959 (1985) (private creche in public park).

County of Allegheny, 106 L.Ed.2d at 499, n.50.

This case squarely presents the "public forum" issue addressed in footnote 50 where the Court confirmed the vitality of *Widmar* and *McCreary* and recognized that religious displays on public forum property are protected by the First Amendment. The reasoning of the opinion for the court below conflicts with the well-settled principle of *Widmar v. Vincent*, 454 U.S. 263 (1981) that an equal access policy that includes religious speech and speakers in a public forum does not violate the Establishment Clause. In fact, that principle is even more compellingly presented in this case, which involves a "quintessential"

public forum, *Perry Education Assoc. v. Perry Local Education Assoc.*, 460 U.S. 37, 45 (1983); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), and not just a designated forum as in *Widmar*, 545 U.S. at 267 n.5.

The opinion below mandates content based censorship of religious expression in a public forum. Such censorship has always been disfavored and subjected to the most exacting scrutiny, requiring both a compelling state interest and a narrowly drawn restriction. *Texas v. Johnson*, 109 S.Ct. 2533 (1989); *Boos v. Barry*, 485 U.S. 312 (1988); *Sable Communications of California v. FCC*, 492 U.S. _____, 106 L.Ed 2d 93 (1989); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McCreary v. Stone*, 739 F.2d. 716 (2nd Cir. 1984), affirmed by an equally divided court *sub.nom*, *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

The Establishment Clause of the First Amendment reaches government conduct, not private speech in a public forum. The opinion for the Court below effectively eliminates religious speech and speakers from traditional public fora. Such a result undermines our nation's commitment to "uninhibited, robust and wide open," public debate on the issues of the day, *New York Times v. Sullivan*, 376 U.S. 254, 271, 1964) by removing a whole class of speech - religious speech - from the public. As noted by this Court in *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949):

> The right to speak freely and to promote diversity of ideas and programs is...one of the chief distinctions that sets us apart from totalitarian regimes

This includes religious speech and ideas, as Justice Brennan wrote in *McDaniel v. Paty et al.*, 435 US 618, 641 (1978):

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

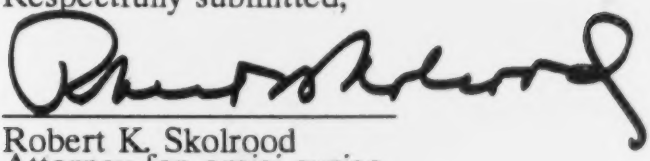
As the petition so ably points out, the Court of Appeal's decision would not afford the same constitutional protection to those who wish to symbolically commemorate Hanukkah as to those who wish to burn the American flag.

This case presents an appropriate opportunity for the Court to clarify its position that religious speech, including symbolic speech, is not second-class speech, but is accorded full constitutional protection. The opinion erroneously singles out religious speech for disfavored treatment based upon its proximity to some edifice or other structure that might suggest government had some connection to the message delivered. No other form of private speech in a public forum is subjected to such treatment.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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